



[4910–13]

## **DEPARTMENT OF TRANSPORTATION**

### **Federal Aviation Administration**

#### **Waiver of Requirement to Enter Into a Reciprocal Waiver of Claims Agreement With All Customers for Orbital Sciences Corporation**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of waiver.

**SUMMARY:** This notice concerns a petition for waiver submitted to the Federal Aviation Administration (FAA) by Orbital Sciences Corporation (Orbital) to waive in part the requirement that a launch operator enter into a reciprocal waiver of claims with each customer. The FAA grants the petition.

**FOR FURTHER INFORMATION CONTACT:** For technical questions concerning this waiver, contact Charles P. Brinkman, Licensing Program Lead, Commercial Space Transportation - Licensing and Evaluation Division, 800 Independence Avenue, S.W., Washington, DC 20591; telephone: (202) 267-7715; e-mail: [Phil.Brinkman@faa.gov](mailto:Phil.Brinkman@faa.gov). For legal questions concerning this waiver, contact Sabrina Jawed, Attorney-Adviser, Space Law Branch, AGC-250, Office of the Chief Counsel, Regulations Division, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-8839; e-mail: [Sabrina.Jawed@faa.gov](mailto:Sabrina.Jawed@faa.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

On August 8, 2013, Orbital submitted a petition to the FAA's Office of Commercial Space Transportation (AST) requesting a waiver under its launch license for

flight of an Antares launch vehicle carrying Orbital's Cygnus module.<sup>1</sup> Orbital requested a partial waiver of 14 CFR 440.17, which requires a licensee to enter into a reciprocal waiver of claims (a "cross-waiver") with each of its customers.

The FAA licenses the launch of a launch vehicle and reentry of a reentry vehicle under authority granted to the Secretary of Transportation by the Commercial Space Launch Act of 1984, as amended and re-codified by 51 U.S.C. Subtitle V, chapter 509 (Chapter 509), and delegated to the FAA Administrator and the Associate Administrator for Commercial Space Transportation, who exercises licensing authority under Chapter 509.

The petition for waiver applies to Orbital's September 2013 launch of an Antares launch vehicle and Orbital's Cygnus pressurized cargo module to be used in the delivery of cargo to the International Space Station (ISS). The Cygnus cargo module will carry cargo for NASA to resupply the ISS. In addition to the ISS supplies, the Antares may also carry other payloads whose transport NASA has arranged as part of the Johnson Space Center cargo. These consist of a NanoRacks, LLC, and NanoRacks locker insert and student experiments created under NASA's Student Spaceflight Experiments Program (SSEP). NASA describes SSEP as a national science, technology, engineering, and mathematics education initiative.<sup>2</sup> According to its Space Act Agreement with NASA,<sup>3</sup> NanoRacks arranges to carry the student experiments on a locker insert to put

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<sup>1</sup> This mission is also referred to as OrbD-1. See Letter from Mark A. Wright, Manager, Safety Inspection Division AST, to Natalie Imfeld, Contracts Manager, Advanced Programs Group Orbital Sciences Corporation (August 16, 2013) (on file with FAA) (referring to Antares launch of the Cygnus payload as ORB-D1 Mission).

<sup>2</sup> Space Station—Here we Come! NASA Press Release: <http://www.nasa.gov/audience/foreducators/station-here-we-come.html> (last visited August 16, 2013).

<sup>3</sup> Nonreimbursable Space Act Agreement Between NanoRacks, LLC and NASA for Operation of the NanoRacks System Aboard the International Space Station National Laboratory, (Sept. 4 and 9 2009) (NanoRacks Agreement), 387938main—SAA—SOMD—6355—NanoRacks—ISS—National—Lab.pdf.

into an experimental locker on board the ISS. The Space Act Agreement states that NASA will provide on-orbit resources and limited launch opportunities to NanoRacks for the launch of its insert and the experiments the insert carries. Orbital provided the FAA, along with its petition for waiver, a letter signed by Christopher Cummins, Chief Operating Officer of NanoRacks, stating that NanoRacks will not have any personnel at the launch site for the OrbD-1<sup>4</sup> launch, which is the launch that is the subject of this waiver.

NanoRacks and each student who places a payload on board the NanoRacks insert qualify as customers under the FAA's definitions. Section 440.3 defines a customer, in relevant part, as any person with rights in the payload or any part of the payload, or any person who has placed property on board the payload for launch, reentry, or payload services. A person is an individual or an entity organized or existing under the laws of a State or country. 51 U.S.C. 50901(12), 14 CFR 401.5. The subjects of this waiver are persons because the students are individuals and NanoRacks is an entity, a limited liability corporation. Accordingly, because NanoRacks and the students are persons who have rights in their respective payloads, the locker insert and the experiments, due to their ownership of those objects, and because they have placed property on board, they are customers. Section 440.17 requires their signatures as customers.

In this instance, however, NanoRacks and the students are also subject to a NASA reciprocal waivers of claims, a cross-waiver, which is governed by NASA's regulations at

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<sup>4</sup> OrbD-1 refers to the COTS Demo mission currently scheduled to launch in September on the Antares launch vehicle from Wallops. See Letter from Mark A. Wright, Manager, Safety Inspection Division AST, to Natalie Imfeld, Contracts Manager, Advanced Programs Group Orbital Sciences Corporation (August 16, 2013) (on file with author) (referring to Antares launch of the Cygnus payload as ORB-D1 Mission).

14 CFR part 1266. Article 8 of the Space Act Agreement between NASA and NanoRacks governs liability and risk of loss and establishes a cross-waiver of liability.

Other than the NanoRacks and SSEP customers, all other customers as defined by 14 CFR 440.3 will execute the cross-waivers required by 14 CFR 440.17. The cross-waivers among Orbital and all customers, other than NanoRacks and SSEP customers, are amended to provide that signing customers waive claims against any other customer as defined by 14 CFR 440.3. The petition for partial waiver of the requirement that the licensee implement a cross-waiver with each customer applies to NanoRacks and the SSEP customers as customers of the September 2013 launch of the Antares launch vehicle carrying the Cygnus module.

**Waiver Criteria:**

Chapter 509 allows the FAA to waive a license requirement if the waiver (1) will not jeopardize public health and safety, safety of property; (2) will not jeopardize national security and foreign policy interests of the United States; and (3) will be in the public interest. 51 U.S.C. 50905(b)(3) (2013); 14 CFR 404.5(b) (2013).

**Waiver of FAA Requirement for Each Customer to Sign a Reciprocal Waiver of Claims:**

The FAA waives 14 CFR 440.17, which requires a licensee to enter into a reciprocal waiver of claims with each of its customers with respect to NanoRacks and the SSEP participants for the September 2013 Antares launch.

In 1988, as part of a comprehensive financial responsibility and risk sharing regime that protects launch participants and the U.S. Government from the risks of catastrophic loss and litigation, Congress required that all launch participants agree to

waive claims against each other for their own property damage or loss, and to cover losses experienced by their own employees. 51 U.S.C. 50915(b). This part of the regime was intended to relieve launch participants of the burden of obtaining property insurance by having each party be responsible for the loss of its own property and to limit the universe of claims that might arise as a result of a launch. H. Rep. 100-639, at 11-12 (1988); S. Rep. 100-593, at 14, (1988); *Financial Responsibility Requirements for Licensed Launch Activities, Notice of Proposed Rulemaking*, 61 FR 38992, 39011 (Jul. 25, 1996). The FAA's implementing regulations may be found at 14 CFR part 440.

In its request for a waiver, Orbital submits that the NASA Space Act Agreement reciprocal waivers of claims imposed on NanoRacks and the SSEP participants are equivalent to the requirements imposed on each customer under the FAA's requirements of 14 CFR part 440. A comparison of the two regimes shows that in this particular situation the two sets of cross-waivers are sufficiently similar that the statutory goals of 51 U.S.C. 50914(b) will be met by the FAA agreeing to accept the NASA cross-waivers in this instance.

The FAA cross-waivers require the launch participants, including the U.S. Government and each customer, and their respective contractors and subcontractors, to waive and release claims against all the other parties to the waiver and agree to assume financial responsibility for property damage sustained by that party and for bodily injury or property damage sustained by the party's own employees, and to hold harmless and indemnify each other from bodily injury or property damage sustained by their respective employees resulting from the licensed activity, regardless of fault. 14 CFR 440.17(b) and

(c). Each party<sup>5</sup> to the cross-waiver must indemnify the other parties from claims by the indemnifying party's contractors and subcontractors if the indemnifying party fails to properly extend the requirements of the cross-waivers to its contractors and subcontractors. 14 CFR 440.17(d). A comparison of each element shows that, although there are some differences, because the NASA cross-waiver signed by NanoRacks is consistent with Congressional intent and the FAA's regulations, because relevant employees will not be present at the launch site, and because the Orbital cross-waiver submitted to the FAA has been amended to protect non-signing customers, NanoRacks and the SSEP participants need not sign a cross-waiver under 14 CFR part 440. For the reasons stated in the waiver the FAA published for SpaceX on October 16, 2012,<sup>6</sup> and for the reasons stated above, the FAA finds that this waiver implicates no safety, national security or foreign policy issues. The waiver is consistent with the public interest goals of Chapter 509. Under 51 U.S.C. 50914, Congress determined that it was necessary to reduce the costs associated with insurance and litigation by requiring launch participants, including customers, to waive claims against each other. Because the NanoRacks Agreement under 14 CFR part 1266 accomplishes these goals by the same or similar means, the FAA finds this request in the public interest, and grants the waiver with respect to NanoRacks and the SSEP participants in reliance on the representations Orbital made in its petition.

Issued in Washington, DC on September 10, 2013.

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<sup>5</sup> Indemnification by the U.S. Government is conditioned upon the passage of legislation. 51 U.S.C. 50915; 14 CFR 440.17(d).

<sup>6</sup> Waiver of Requirement to Enter Into a Reciprocal Waiver of Claims Agreement With All Customers, Notice of Waiver, 77 FR 63221 (Oct. 16, 2012).

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